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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT MICHAEL HANAHAN,
Petitioner,

v.

DENNIS M. LUTHER, Warden,
and WILLIAM PILCHER, Chief Probation Officer,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Upon a petition for a writ of habeas corpus what is the correct standard for reviewing the sufficiency of the evidence relied upon by the United States Parole Commission in finding that a parolee has violated his parole.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, by his attorney, petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit affirming the denial of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is not reported pursuant to Circuit

Rule 35. It is reproduced in the Appendix. The opinion of the district court is not reported. It is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 27, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Pursuant to Supreme Court Rule 2.1(f) the following constitutional provisions, rules, and statutes are set forth in the appendix:

Title 18 United States Code § 4206(a)
Title 18 United States Code § 4214(d)
Title 28 United States Code § 2241
United States Constitution, Fifth Amendment

STATEMENT

On December 3, 1979, the Petitioner, who was on federal parole, was arrested by Chicago Police Officers, and was charged, in the Circuit Court of Cook County, Illinois, with possession of firearms and possession of a stolen motor vehicle.[1] On December 14, 1979, the United States Parole Commission issued its warrant for Petitioner's arrest and charged him with four grounds to violate his parole: association with known criminals; unlawful possession of firearms; possession of a stolen motor vehicle; and conspiracy to commit savings and

[1] On December 4, 1979, a finding of a no probable cause was made on the firearms charge and in March, 1980, Petitioner was found not guilty of the possession of a stolen motor vehicle charge.

loan robbery. Petitioner surrendered to the United States Marshal and was granted bail by the district court on December 26, 1979.

On January 8, 1980, Petitioner's counsel had a conference with the United States Probation Officer who advised that the Commission was going to consolidate his preliminary hearing and his final hearing because the petitioner was going to request the presence of adverse witnesses and the Commission would only call witnesses once. The Probation Officer further advised that the Commission had instructed her not to show any documents to Petitioner's attorney. On January 9, 1980, the Petitioner demanded a preliminary hearing with adverse witnesses; requusted a copy of the police reports; and requested a subpoena for an additional witness.

On January 11, 1980, Petitioner was instructed that a request under the Privacy Act had to be filed to review appellant's file. Such a request was filed on January 21, 1980. On February 6, 1980, the Commission responded but refused to produce any document concerning the December 3, 1979, arrest on the grounds that disclosure would be harmful to someone.[2]

On April 29, 1980, Petitioner had a hearing before two hearing examiners of the Commission. Petitioner objected to proceeding because no adverse witnesses were present and the witness that Petitioner requested be subpoenaed had not been subpoenaed. One of the examiners read two short conclusory paragraphs from a Chicago Police report but would not allow Petitioner's attorney to see the multipage report. The Petitioner testified that, on December 3, 1979, he had worked at his employment as a carpenter and, after work, he borrowed the 1977 Ford van from Maxine Shipp in order to pick up a case of fruit from Mr. Paul Panzcko. Mr. Panzcko was in the business

[2] The police reports were submitted to the district court in camera as G. Exs. 1 & 2 and have never been disclosed to Petitioner.

of selling produce which he bought at wholesale. The Petitioner had purchased produce from Mr. Panczko on three or four other occasions.

Petitioner met with Mr. Panczko in a restaurant located approximately four blocks from Petitioner's home. Mr. Panczko had Mr. Siegal, Mr. Tomasek, and Mr. Pullia and him. While all three persons were known to Petitioner, he did not know they were going to be there. Petitioner gave Mr. Panczko, Mr. Siegal and Mr. Pullia a ride to Panczko's Cadillac which was parked in the parking lot of a large office complex about a block from the restaurant. Mr. Tomasek followed in his own car.

Petitioner testified that when they arrived in the parking lot, he parked next to the Cadillac and they all got out and had a conversation near the front of the van. Mr. Panczko left the group and went to the trunk of the Cadillac. When he returned, Mr. Panczko, Mr. Siegal, and Mr. Pullia got into the Cadillac. All three vehicles left the lot. When they got to a stop sign at a frontage road, an unmarked car attempted to stop them. Petitioner fled because he was on federal parole but he was apprehended.

On May 12, 1980, the Commission advised that it was going to find that Petitioner violated his parole on the charge of possession of firearms and on the charge of association with a known felon.

After being advised that a new hearing was going to be ordered with adverse witnesses, Petitioner, on May 27, 1980, again requested a subpoena for Maxine Shipp. In addition, Petitioner requested a subpoena for the records of United Fruit Auction Sales, Inc. These requests for subpoenas were denied on the ground that affidavits could be procured.

On August 18, 1980, a second hearing was held. Sargent David Welch and Investigator Dennis Farina for the Chicago Police Department testified as adverse witnesses. The officers

testified to how they began surveillance of Mr. Panczko, Mr. Pullia and Mr. Siegal at about 3:00 P.M. on December 3, 1980. Mr. Panczko drove to a parking lot of an office complex and the three individuals got out of Mr. Panczko's Cadillac and left the area. The Police maintained surveillance on the Cadillac and at approximately 6:30 P.M. a 1977 Ford van driven by Petitioner and a Chevrolet driven by Mr. Tomasek entered the lot and parked on the left side of the Cadillac. Mr. Pullia, Mr. Siegal, Mr. Panczko and Petitioner got out of the van and had a conversation with Mr. Tomasek at the front passenger side of the van. Mr. Panczko left the group and went to the trunk of the Chevrolet and took a shopping bag out. He placed the bag into the side door of the van. Officer Farina observed a crow bar protruding from the bag. Mr. Panczko, Mr. Pullia and Mr. Siegal got into the Cadillac and all the vehicles left the parking lot. The police decided to stop the vehicles and to question the occupants. When the police attempted to stop the vehicles, Petitioner fled pursued by Sgt. Welch who apprehended Petitioner.

After arresting Petitioner, Sgt. Welch searched the van. In the well of the side door, he found the paper bag which contained two handguns and some plastic face masks. A crow bar was in the well of the door and a third hand gun was found loose on the floor of the back of the van.

On September 10, 1980, the hearing examiners found that Petitioner had violated his parole on four charges. The decision stated that the decision on the charge of unauthorized association with known criminals was based on a probation officer's letter of December 10, 1979, the December 5, 1979, police reports, and the testimony of the officers. The decision on the charge of unauthorized possession of firearms was based on the probation officer's letter, the December 5, 1979 police reports and the testimony of Sgt. Welch. The Regional Commissioner affirmed the decision on October 16, 1980. The National Appeals Board affirmed on two charges on January 28, 1981.

The district court after examination of the documents submitted, denied Petitioner's Petition for a Writ of Habeas Corpus filed pursuant to 28 U. S. C. § 2241. In doing so, the district court held that the proper standard for reviewing a decision of the Parole Commission is not whether the decision was supported by a preponderance of the evidence but whether there is a rational basis for the conclusions of the Commission.

The United States Court of Appeals for the Seventh Circuit affirmed this decision and adopted the rational basis test as the standard for reviewing a parole revocation decision of the United States Parole Commission.

REASONS FOR GRANTING THE WRIT

THE DECISION HELD BELOW CONFLICTS WITH THE STATUTORY BURDEN OF PROOF ESTABLISHED BY CONGRESS AND WITH THE PRIOR DECISION OF THIS COURT.

The decision below held that the sufficiency of the evidence to support a finding that a parolee has violated a condition of his parole is not reviewable upon a petition for a writ of habeas corpus. The decision held that the only issue is whether there is a rational basis in the record for the Commission's decision. In reaching this conclusion, the decision relies upon *Luther* v. *Molina*, 627 F. 2d 71 (7th Cir. 1981); *Zannio* v. *Arnold*, 531 F. 2d 687 (3d Cir. 1976); and *DeFillio* v. *Fitzpatrick*, 378 F. 2d 85 (2d Cir. 1967). In each of these cases the issue was the proper standard for reviewing the totally discretionary decisions of the Commission in granting parole or release pending a revocation proceeding.

The Act creating the United States Parole Commission grants the Commission wide discretion in granting parole, 18 U.S.C. § 4206(a). However, this same act limits this discretion in revoking parole to those situations where it has been proven by a preponderence of the evidence that a parole violation has

occurred, 18 U.S.C. § 4214(d). The legislative history clearly indicates the Congress considered this Court's decision, in *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), to the effect that a parolee has a valued interest in his parole and Congress established that this valued interest should not be taken away unless there is sufficient evidence by a preponderance of the evidence to prove the parolee violated the conditions of his parole. *Parole and Reorganization Act*, 1976 U.S. Code Congressional and Administrative News, pg. 367.

This Court's decision in *Jackson* v. *Virginia*, 443 U.S. 301 (1979) and *Woodby* v. *INS*, 385 U.S. 276 (1966) are in conflict with the decision below for these decisions hold that the proper standard of review on a petition for a writ of habeas corpus, in this instance, is whether a rational trier of fact could have found the essential elements of the violation by a preponderance of the evidence.

The essential elements could not be proven in this instance. 28 C.F.R. § 2.20 provides that a parole violation based on new criminal conduct shall be based upon applicable state or federal law. Here, the charge of unauthorized possession of firearms could have been based upon 18 U.S.C. § 922(g), 18 U.S.C. App. § 1202, or Ill. Rev. Stat. Ch. 38, § 24-1. Each of these statutes, at a minimum, requires a finding of knowledge as an essential element. Here, no rational trier of fact could find that Petitioner knew another individual had placed firearms in his van.

The decision below recognizes that the Commission has discretion in parole violation cases which Congress never meant for it to have and which concepts of due process prohibit the Commission from acquiring. The decision below by limiting review of the sufficiency of the evidence in habeas corpus actions from decisions of the Commission revoking parole precludes the parolee from having the sufficiency of the evidence against him reviewed by the courts.

CONCLUSION

For the foregoing reasons, this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment in the instant case.

Respectfully submitted,

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September, 1982

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED: March 29, 1982)

Unpublished Order
Not to be Cited
Per Circuit Rule 35

August 27, 1982

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge**

ROBERT MICHAEL HANAHAN,
Petitioner-Appellant,

No. 81-2176

vs.

DENNIS M. LUTHER, Warden, and WILLIAM PILCHER, Chief Probation Officer,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 81-2176

Honorable
Frank J. McGarr,
Judge.

ORDER

Robert Michael Hanahan petitioned for a writ of habeas corpus, challenging the revocation of his federal parole. The district court denied the petition and Hanahan appeals.

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* Circuit Judge Robert A. Sprecher was assigned to the panel to hear oral argument in this case. He had read the briefs prior to oral argument but was unable to be present at the argument and did not participate thereafter in the decision of the case because of his failing health and subsequent death on May 15, 1982.

Hanahan was on federal parole after having been convicted of bank robbery and robbery of an Internal Revenue Service facility. The incident giving rise to the issuance of a parole violator warrant against Hanahan was his arrest, along with Paul Panczko, Robert Pullia, Gerald Tomaszek, and Robert Siegal, on December 3, 1979. The five men had met in the parking lot of Northwest Federal Savings Association in Chicago, Illinois. When police officers approached the group, Hanahan and the other four attempted to flee. Hanahan departed in the van he had been driving and led police on a high-speed chase. He was apprehended and the van was searched. The police officers found two handguns in a brown paper bag, a third handgun loose in the back of the van, rubber face masks, a crowbar, and a sledge hammer.

On December 14, 1979, the United States Parole Commission issued a parole violator warrant against Hanahan, charging him with violating four conditions of his parole: unauthorized association with known criminals, unauthorized possession of firearms, possession of a stolen motor vehicle, and conspiracy to commit savings and loan robbery. On February 15, 1980, a supplemental warrant was issued charging Hanahan with unauthorized association with a known felon and leaving the district without permission.

Following issuance of the first parole violator warrant, Hanahan's attorney requested that he be given access to police reports relating to the arrest and that subpoenas be issued for adverse and favorable witnesses. Hanahan's attorney filed a Freedom of Information Act request for the police reports, but the Parole Commission declined to release them because they might reveal the identity of a confidential informant or result in physical harm to another person.

The Parole Commission scheduled a preliminary hearing on the parole violator warrant for January 2, 1980. Hanahan was granted a postponement of the preliminary hearing in

order to retain counsel. Following the postponement, the Commission notified Hanahan that the preliminary and final revocation hearings would be consolidated. Although Hanahan's attorney had given notice on January 9, 1980, that he would be engaged in a six-week trial beginning February 6, 1980, Hanahan's consolidated hearing was scheduled for February 19 to February 22. Hanahan requested and received a six to eight-week continuance. The consolidated hearing was then held on April 29, 1980, and Hanahan's parole was revoked.

Subsequent to the revocation decision, the Regional Commissioner of the Parole Commission noted that, although Hanahan had requested the presence of adverse witnesses at his hearing, none had been present. Accordingly, the Commission ruled that Hanahan was entitled to a new parole revocation hearing at which adverse witnesses would be present. A second hearing was held August 18, 1980, at which Hanahan, his counsel, and adverse witnesses were present. Hanahan had requested that the Commission subpoena Maxine Shipp, the owner of the van he was driving when arrested, along with the records of United Fruit Auction, Inc. This request was denied, however, and the Parole Commission again found that Hanahan had violated four conditions of his parole.

Hanahan appealed the revocation decision to the Regional Commissioner and to the Parole Commission's National Board of Appeals. The Appeals Board affirmed the revocation on only two grounds: unauthorized association with known criminals and unauthorized possession of firearms. Hanahan then filed a petition for a writ of habeas corpus with the district court, alleging a number of statutory and constitutional violations in the course of his parole revocation proceedings.[1] The district court denied the petition.

---

[1] Although Hanahan is a federal prisoner, his petition for a writ of habeas corpus correctly seeks relief under 28 U.S.C. § 2241 rather than 28 U.S.C. § 2255. Because Hanahan is not attacking his sentence, § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255. *See Zannino v. Arnold*, 531 F.2d 687, 689 n.5 (3d Cir. 1976).

I

Hanahan argued below that the Parole Commission's decision that he had violated the conditions of his parole was not supported by a preponderance of the evidence. The district court rejected this argument, finding a rational basis for the Parole Commission's decision. Hanahan now contends that the district court erred in applying merely a "rational basis" standard of review. Instead, Hanahan contends, the district court should have independently determined whether the Commission's decision was supported by a preponderance of the evidence.

We find that the district court applied the correct standard of review in this case. As we said in *Luther v. Molina*, 627 F.2d 71 (7th Cir. 1980), "[i]t is apparent that Congress intended to give the Parole Commission great latitude in making decisions relative to [parole] revocation." *Id.* at 75. Although this wide discretion does not eliminate the possibility of habeas corpus relief, it does mean that district courts should grant such relief only in limited circumstances. *Id.* at 75-76. Thus, when a district court reviews a decision of the Parole Commission on a habeas corpus petition, "[t]he inquiry is not whether the Board is supported by the preponderance of the evidence, or even by substantial evidence; the inquiry is only whether there is a rational basis in the record for the Board's conclusions embodied in its statement of reasons." *Zannino v. Arnold*, 531 F.2d 687, 691 (3d Cir. 1976). *See Defillo v. Fitzpatrick*, 378 F.2d 85, 87 (2d Cir. 1967).

Under this standard of review the district court correctly held that "[b]ased on the totality of the evidence presented, . . . the decision reached by the Commission and affirmed by the Board of Appeals was rationally based and was not arbitrary or capricious." At the revocation hearing, Hanahan admitted having associated with Robert Pullia and with Paul Panczko,

both known felons, on several occasions. Police officers testified at the hearing that Hanahan had rendezvoused with known felons in a savings and loan parking lot; that one of these felons had transferred firearms and tools to the van driven by Hanahan; that Hanahan had led the police on a high-speed chase in an attempt to escape; and that handguns, a crowbar, and masks had been found in the van. It is clear from these facts that the Commission had rational bases for concluding that Hanahan violated the conditions of his parole. We therefore agree with the district court that the decision of the Parole Commission, as affirmed by the Board of Appeals, should not be disturbed on this ground.

II

Hanahan's next argument is that when the National Appeals Board affirmed the finding that Hanahan had associated with known criminals, it relied in part on the Circuit Court of Cook County transcript of his testimony regarding a charge of possession of a stolen motor vehicle. Hanahan contends that consideration of the transcript, without notice to him, violated his right to be apprised of the evidence against him. *See* 18 U.S.C. § 4214(a)(2)(D); U.S. CONST. amends. 5 & 6.

Hanahan challenges only one of the two grounds on which the Appeals Board affirmed the finding that he had associated with known criminals. The unchallenged basis was the testimony at the August 18, 1980, parole revocation hearing that Hanahan was arrested in the company of four other convicted felons. The only ground attacked by Hanahan is the Board's reference to his testimony, given at his state court hearing, that he had fled from the police because he did not wish to be found associating with other criminals.

Hanahan is correct that a parolee has a right to be apprised of the evidence against him and to confront and cross-examine witnesses; however, the district court held, and we agree, that

Hanahan's rights were respected in this case. The Supreme Court has emphasized the informal and flexible nature of parole revocation proceedings, and has specifically sanctioned the use of evidence "that would not be admissible in an adversary criminal trial." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). Moreover, both Hanahan and his attorney were present at the state court proceeding where they had a full opportunity to participate. Finally, Hanahan's attorney himself brought to the Board's attention Hanahan's state court acquittal on the stolen vehicle charge. Hanahan cannot, therefore, reasonably claim that he was unaware of his state court testimony or the uses to which it could be put by the Appeals Board. Under these circumstances, we find that the consideration of the state court transcript did not violate Hanahan's right to be apprised of the evidence against him.[2]

III

In the course of his parole revocation proceedings, Hanahan requested access to the police reports relating to his December 3, 1979, arrest. The Parole Commission refused to release the reports because they contained information that might reveal the identity of a confidential informant or result in physical harm to someone. Hanahan argues that the failure to produce these reports, which were relied upon by the Commission, violated his right to be apprised of the evidence against him under 18 U.S.C. § 4214(a)(2)(D).

The district court agreed that the police reports should have been disclosed, but found that the failure to produce them was harmless error. Assuming *arguendo* that the police reports

[2] Even if the Board's reliance on the transcript were found to be error, our decision would not change. The Board's finding rested upon two independent bases. The testimony that Hanahan was observed and arrested in the company of known criminals was itself a sufficient ground for the Board's decision.

were improperly withheld, we agree with the district court that such an error was harmless. Both the Parole Commission and the Board of Appeals relied on other sources of information in deciding to revoke Hanahan's parole. In addition to the undisclosed police reports, the Parole Commission explicitly based its decision on the live testimony of police officers at the revocation hearing and on a letter from Hanahan's parole officer. The Board of Appeals did not rely on the police reports at all. The Board affirmed the Commission's decision on the basis of the police officers' testimony and Hanahan's own testimony before the Circuit Court of Cook County.

The revocation of Hanahan's parole was, therefore, supported by an abundance of evidence apart from the police reports. Hanahan was aware of all of this evidence and had an opportunity to challenge it before both the Commission and the Board. The district court was correct in deciding that, in these circumstances, the Commission's refusal to disclose the reports was harmless error. *See United States v. Batencort*, 592 F.2d 916, 917 (5th Cir. 1979); *United States v. Marr*, 428 F.2d 614, 616 (7th Cir. 1970).

IV

Hanahan's fourth argument on appeal is that he was denied a prompt preliminary hearing, contrary to 18 U.S.C. § 4214(a)(1) and in violation of his right to due process of law. His fifth argument is that the delay in providing a final revocation hearing with witnesses present also denied him due process. We address these contentions together.

The parole violator warrant against Hanahan was issued on December 14, 1979. A preliminary hearing was scheduled for January 2, 1980, but it was continued at Hanahan's request in order for him to retain counsel. Subsequently Hanahan requested a parole revocation hearing with adverse witnesses present. The Commission scheduled a consolidated preliminary and final revocation hearing for February 19 to February 22,

1980. Because Hanahan's attorney was to begin a lengthy trial in early February, Hanahan requested and was granted a six to eight week continuance, and the hearing was rescheduled for April 29, 1980. The April 29 hearing was clearly defective, for no adverse witnesses were present. The Commission therefore granted Hanahan a new revocation hearing, which was held on August 18, 1980.

Due process requires that a parolee receive a revocation hearing within a reasonable time after being taken into custody. *United States ex rel. Sims v. Sielaff*, 563 F.2d 821, 825 (7th Cir. 1977). Three months has been mentioned in some cases as the outside limit of reasonableness, *United States ex rel. Hahn v. Revis*, 520 F.2d 632, 638 (7th Cir. 1975), *vacated and modified*, 560 F.2d 264 (7th Cir. 1977). The three-month time period is, however, no more than a guideline, *United States ex rel. Sims v. Sielaff*, 563 F.2d 821, 827 (7th Cir. 1977), and the sanction for exceeding it is not necessarily to dismiss the parole violator warrant. *Smith v. United States*, 577 F.2d 1025, 1028-29 (5th Cir. 1978).

A parolee's claim that his due process rights have been violated by the delay preceding his parole revocation hearing cannot be judged using arbitrary guidelines. *United States ex rel. Sims v. Sielaff*, 563 F.2d 821, 828 (7th Cir. 1977). Rather, we must apply the standards suggested in *Barker v. Wingo*, 407 U.S. 514 (1972), for determining whether a defendant's constitutional right to a speedy trial has been denied. *United States ex rel. Sims v. Sielaff*, 563 F.2d at 828. The four factors to be considered under *Barker* are: the length of the delay, the reasons for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant as a result of the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). No single factor is either necessary or sufficient to a finding of a deprivation of a constitutional right. Each should be considered together with the relevant circumstances in "a difficult and sensitive balancing process." *Id.* at 533. We must, therefore,

consider the course of Hanahan's parole revocation proceedings in light of these four factors. *See United States ex rel. Sims v. Sielaff*, 563 F.2d 821, 828-29 (7th Cir. 1977).

Eight months elapsed between the issuance of a parole violator warrant against Hanahan on December 14, 1979, and his final parole revocation hearing on August 18, 1980. The district court found, however, that the delay from January 2, 1980, through April 22, 1980, was due to Hanahan's requests for postponements. We agree. That delay was, therefore, perfectly reasonable. We then must examine the period of time between Hanahan's April 29, 1980, revocation hearing - which was admittedly defective - and the August 11, 1980, hearing. This delay was due to the Commission's own efforts to provide Hanahan with a hearing comporting with due process. Nonetheless, the four-month delay, while not *per se* unreasonable, raises a due process question. We must, therefore, consider the final two *Barker* factors in determining whether Hanahan's rights were violated.

The third factor is whether the parolee asserted his right to a prompt hearing. The *Barker* Court held that a defendant's silence does not waive the right to a speedy trial, *Barker v. Wingo*, 407 U.S. 514, 528 (1972), but "[t]he defendant's assertion of his speedy trial right ... is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* at 531-32. The fact that Hanahan made no demand for a prompt hearing after his postponement was granted in January, 1980, makes it "difficult for [Hanahan] to prove that he was denied a speedy [hearing]." *Id.* at 532.

Finally, we can find no prejudice to Hanahan resulting from the delay here. the *Barker* Court identified three interests protected by the speedy trial right which we find helpful in deciding whether Hanahan was prejudiced by the delay. These three interests are: "(i) to prevent oppressive pretrial in-

carceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532 (footnote omitted). Hanahan was not incarcerated for the great majority of this period, and as a convicted felon on parole, his level of anxiety cannot be said to be as high as that of an unconvicted defendant. Indeed, Hanahan has not argued that oppressive pretrial incarceration or anxiety and concern have in any way prejudiced his interests.

Hanahan does contend, however, that the delay impaired his defense because it resulted in the loss of the testimony of Maxine Shipp. Shipp, the owner of the van Hanahan was driving when he was arrested, could not be located by the time of the August 18, 1980, hearing. According to Hanahan, Shipp would have testified that he had borrowed her van in order to pick up a crate of fruit from Paul Panczko, one of the men arrested along with Hanahan. The absence of her testimony, argues Hanahan, made it easier for the Commission to infer guilty knowledge from his actions.

Even if we accept that Shipp would have so testified, we cannot see that the absence of such testimony prejudiced Hanahan. Hanahan's parole was revoked for unauthorized association with known criminals and unauthorized possession of firearms. Shipp's testimony would not have been at all probative on these two points; it could only have explained his stated reason for borrowing the van. The charges on which Hanahan's parole was revoked were supported by evidence that Shipp's testimony could not have contradicted. Thus, we cannot agree that the loss of the testimony, if due to the delay, resulted in prejudice to Hanahan.

Having considered the facts of this case in light of the four *Barker* factors, and recognizing, as we must, the importance of a parolee's due process right to a prompt revocation hearing, we find that Hanahan's rights were not violated by the delay here.

V

Hanahan's final argument is that his right to due process of law was violated by the Commission's refusal to subpoena Maxine Shipp and the records of the United Fruit Auction company. As noted above, Hanahan claims that Shipp could have explained his reason for borrowing her van. The records of United Fruit Auction, according to Hanahan, would have established that Paul Panczko was indeed purchasing fruit for resale in December, 1979. Hanahan argues that this evidence would have supported his story that he met with Panczko and the others for the purpose of obtaining a crate of fruit.

Morrissey v. Brewer, 408 U.S. 471 (1972), guarantees parolees the "opportunity to be heard in person and to present witnesses and documentary evidence" and "the right to confront and cross-examine adverse witnesses." *Id.* at 489. Hanahan does not contend that he was unable to confront and cross-examine adverse witnesses. His argument is that the Commission's refusal to issue the subpoenas denied him the opportunity to present witnesses and documentary evidence.

Under 18 U.S.C. § 4214(a)(2) the Parole Commission has the power to subpoena witnesses and evidence. Pursuant to that section, the Commission has issued regulations that state:

> [T]he Regional Commissioner may, upon his own motion or upon a showing by the parolee that a witness *whose testimony is necessary to the proper disposition of his case* will not appear voluntarily at a local revocation hearing or provide an adequate written statement of his testimony, issue a subpoena for the appearance of such witness at the revocation hearing.

28 C.F.R. § 2.51(a)(2) (1981) (emphasis added). Hanahan does not challenge the constitutionality of the statute or the Commission's regulation. His argument is that the Commission acted improperly in light of that statute and regulation. We disagree.

Under no circumstances can Maxine Shipp or the fruit company be considered witnesses "whose testimony is necessary to the proper disposition" of this case. Their testimony, tending to show that Hanahan met Panczko in the van to pick up fruit, would do nothing to explain Hanahan's admitted association with known criminals, the presence in the van of three loaded guns, or Hanahan's desperate flight from the police. Those are the facts upon which the Commission's revocation decision was based. The testimony of Shipp or the fruit company, even if accurately characterized by Hanahan, could have added nothing to that evidence. Thus, Hanahan's right to due process was not violated by the Commission's refusal to issue the subpoenas.

VI

For the foregoing reasons, the district court's judgment denying Hanahan's petition for a writ of habeas corpus is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ROBERT MICHAEL HANAHAN,
Petitioner,

v.

DENNIS M. LUTHER, etc.,
Respondent.

No. 79 C 5407

MEMORANDUM OPINION AND ORDER

This is a habeas corpus proceeding in which the petitioner, Robert Michael Hanahan, challenges the Parole Commission's decision to revoke his parole. When paroled, 3,067 days remained on Hanahan's sentence, which resulted from convictions for bank robbery and robbery of an Internal Revenue Service Facility. A parole violator warrant was issued and parole revocation proceedings were commenced on December 14, 1979. The warrant was issued after Hanahan was arrested along with four other convicted felons, one of whom was his co-defendant in a bank robbery prosecution, outside the parking lot of the Northwest Federal Savings Association in Chicago, Illinois. The warrant charged Hanahan with unauthorized association with known criminals, unauthorized possession of firearms, possession of a stolen motor vehicle, and conspiring to commit savings and loan robbery. A supplemental warrant was issued on February 15, 1980, charging Hanahan with unauthorized association with a known felon and leaving the district without permission.

When police officers approached the van Hanahan was driving at the time of his arrest, he tried to escape by leading the police on a high speed chase. He was apprehended and the van was searched. Police found two handguns in a brown paper bag, a third weapon, face masks, a crowbar and a sledge hammer.

The Parole Commission scheduled a preliminary hearing on the warrant for January 2, 1980. The petitioner requested a continuance in order to retain counsel. Hanahan's attorney was advised by the probation officer assigned to the preliminary hearing that the preliminary hearing and the final hearing would be consolidated. Although Hanahan's counsel had given notice on January 9, 1980 that he would be engaged in a six-week trial starting on February 6, Hanahan's consolidated hearing was scheduled for February 19-22. Hanahan requested and received a six to eight-week continuance. The hearing was held on April 29, 1980 and the charges against Hanahan were upheld.

The Regional Commissioner of the Parole Commission held that Hanahan had requested the presence of adverse witnesses, and that, since none were present, Hanahan, therefore was entitled to a new hearing at which adverse witnesses would be present. A subsequent parole revocation hearing was held at which Hanahan's counsel and adverse witnesses subpoenaed by the Commission were present. The Commission again found that Hanahan had violated the conditions of his parole. On appeal, the Board of Appeals of the Parole Commission ("Board of Appeals") sustained the ruling on two of the charges, possession of firearms and association with known criminals.

Hanahan bases his request that this court grant his petition on several grounds. First, he claims that the finding of the Board of Appeals affirming the decision of the Parole Commission that Hanahan was in unauthorized possession of firearms is in error, because the decision was unsupported by a preponderance of the evidence. However, in reviewing the Parole Commission's decision to revoke parole, the district court is directed to inquire only as to whether there is a rational basis for reversing the Parole Commission's conclusions. *Zannino v. Arnold*, 531 F.2d 687, 691 (3d Cir. 1976). The standard of

review is not whether the Commission's decision is supported by a preponderance of the evidence. *Id.* at 691. *See also United States ex rel. Cain v. Board of Parole,* 349 F.Supp. 1177, 1179 (N.D. Ill. 1972).

In the instant cause, the Board of Appeals' ruling that Hanahan realized he was in possession of firearms at the time of his arrest is rationally based on the factual considerations found in the record before it. These include, *inter alia,* the fact that Hanahan and the four others rendevoued in the parking lot in three vehicles, raising the presumption that the meeting was arranged and not accidental. Testimony was introduced at the hearing that Mr. Tomaszek, who was present in the parking lot, transferred the weapons to Hanahan's van almost immediately after the two vehicles arrived in the parking lot. When the police arrived, Hanahan tried to escape.

Based on the totality of the evidence presented, the court concludes that the decision reached by the Commission and affirmed by the Board of Appeals was rationally based and was not arbitrary or capricious. Therefore, the court holds that the decision should not be disturbed on this ground.

Second, Hanahan contends that the Board of Appeals considered testimony he gave before the Circuit Court of Cook County on February 28, 1980, regarding a charge of possession of a stolen motor vehicle, without notice to Hanahan, so as to violate his right to confront and cross-examine witnesses. 18 U.S.C. §§ 4214(a)(2) and 4215(b), the Fifth and Sixth Amendments. There is no question but that a parolee is entitled to the disclosure of documents used against him in a parole revocation proceeding. *Gagnon v. Scarpelli,* 411 U.S. 778, 786 (1973). The government asserts that Hanahan's rights to confront and cross-examine witnesses were honored. The court agrees.

Hanahan was represented by counsel in the state court proceeding, the transcript of which was introduced at the parole

revocation hearing. Hanahan's rights were maintained by the fact that counsel was present in the state court proceeding. The Parole Commission was only reviewing a hearing during which Hanahan had a complete opportunity to participate through his counsel. *See Prellwitz v. Berg,* 578 F.2d 190, 192-3 (7th Cir. 1978).

Third, Hanahan maintains that he was improperly denied a preliminary hearing in contravention of 18 U.S.C. § 4214(a)(1)(A) and the Fifth Amendment. He supports this contention by the claim that he was entitled to a consolidated preliminary and final revocation hearing within the time allowed for a preliminary hearing. 18 U.S.C. §4214(a)(1)(B). *See Morrissey v. Brewer,* 408 U.S. 471 (1972).

Hanahan's claim overlooks the fact that the Parole Commission may delay holding a revocation hearing if the parolee requests the postponement. 28 C.F.R. 2.49(e). It is clear from the record that Hanahan requested postponements from January 2, 1980 through April 22, 1980. All that is at issue, therefore, is whether the time between the April 29, 1980 revocation hearing—which was admittedly defective—and the new hearing held on August 18, 1980, resulted in unreasonable and prejudicial delay.

The evidence does not support a finding that the delay was unreasonable. Hanahan was free to request a new revocation hearing prior to August, 1980. Moreover, Hanahan was at liberty during the entirety of the parole revocation process, having been released on bail on December 26, 1979.

Hanahan also contends that the delay was prejudicial because it resulted in the loss of Maxine Shipps' testimony. According to Hanahan, Ms. Shipps would testify that he borrowed her van in order to pick up grapefruit from Mr. Panzko, one of the individuals present in the parking lot. The Commission initially declined to issue the subpoena in January

on the ground that her affidavit was sufficient. By April, Ms. Shipps' whereabouts were unknown and the Commission was unable to serve her with a subpoena.

The court does not consider the loss of Ms. Shipps' testimony to be prejudicial. Affidavits are considered acceptable substitutes for live testimony in parole revocation hearings. *Gagnon v. Scarpelli*, 411 U.S. 778, 782-83 n. 5 (1973). Moreover, Ms. Shipps' testimony would address the issue of whether Hanahan was in possession of a stolen vehicle in that she allegedly would testify that she lent her van to Hanahan. However, the charge of possession of a stolen vehicle was ultimately dropped by the Board of Appeals. Her testimony would also include that Hanahan went to the parking lot merely to receive a shipment of fruit. Again, the Board's conclusion that Hanahan was not in the parking lot to pick up fruit is substantiated by other uncontroverted factual evidence, such as the rendevous of five felons outside the bank, the presence of weapons, and Hanahan's flight from the police.

Hanahan also argues that the Commission refused to subpoena the records of the United Fruit Action Sales of its transactions with Mr. Panzko for the month of December, 1979, after United Fruit Auction Sales advised the Commission that it would not appear or produce the records without one. These records would merely support Shipps' testimony. They would not dilute conclusions based on the facts presented in the case, such as the weapons or Hanahan's flight from the police. The refusal to issue the subpoena did not violate Hanahan's right to due process.

Finally, Hanahan contends that the Board of Appeals relied upon evidence that was not disclosed to him. The Commission did rely on police reports made at the time of Hanahan's arrest. These should have been, but were not, disclosed. However, the Board of Appeals based its opinion on the live testimony of the police officers. These police officers, involved in Hanahan's arrest, were subpoenaed and present at

the parole revocation hearing. As such, Hanahan's rights to confront and cross-examine adverse witnesses were preserved. Any error that may have resulted from the failure to produce the police reports was harmless.

In conclusion, the court holds that the decision of the Board of Appeals to affirm Hanahan's parole revocation on the grounds of unauthorized association with known criminals and unauthorized possession of firearms was rationally based and was not arbitrary or capricious. The court also holds that Hanahan was properly accorded his constitutional rights and statutory guarantees. The petition for a writ of habeas corpus is, therefore, denied.

ENTER:

/s/ Frank J. McGarr
Frank J. McGarr
United States District Judge

DATED: July 2, 1981

18 USCS § 4206

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) the release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1)[18 USCS § 4203(a)(1)], such prisoner shall be released.

18 USCS § 4214

(d) Whenever a parolee is summoned or retaken pursuant to section 4213 [18 USCS § 4213], and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

(1) restore the parolee to supervision;

(2) reprimand the parolee;

(3) modify the parolee's conditions of the parole;

(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or

(5) formally revoke parole or release as if on parole pursuant to this title [18 USCS §§ 1 et seq.].

28 U.S.C. § 2241.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court wherein the restraint complained of is had.
(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
DEC 28 1982
ALEXANDER L. STEVAS
CLERK

No. 82-557

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT MICHAEL HANAHAN, PETITIONER

v.

DENNIS M. LUTHER, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that an incorrect standard was used by the district court in reviewing the sufficiency of the evidence relied upon by the United States Parole Commission in revoking his parole.

After a hearing before the Parole Commission, petitioner—who was on parole from sentences for federal bank robbery and robbery of an Internal Revenue facility—was found to have violated four conditions of his parole. His parole was revoked, with credit for time served on parole and with eligibility for resumption of parole after two years' custody. The Commission's National Board of Appeals affirmed the revocation, finding that petitioner had violated his parole by his unauthorized association with known criminals and his unauthorized possession of firearms. His petition pursuant to 28 U.S.C. 2241 for a writ of habeas corpus was denied by the United States District Court for the Northern

District of Illinois (Pet. App. 13a-18a). The court of appeals affirmed (Pet. App. 1a-12a).

1. The parole violator warrant against petitioner was issued as the result of his arrest on December 3, 1979, by local police after he met with three other parolees—Paul W. Panczko, Robert Pullia and Gerald Tomaszek—and a fourth person, Robert Siegal. The police began a surveillance of a Cadillac driven by Panczko, in which Pullia and Siegal were passengers, at 3:00 P.M. An hour later the vehicle was parked in a bank parking lot. Two and a half hours later, a van driven by petitioner and a Chevrolet driven by Tomaszek parked next to the Cadillac (C.A. App. Gov't Exh. R 25). Everyone got out of the cars; Panczko then removed a brown paper bag, from which a five foot crowbar protruded, from the trunk of Tomaszek's Chevrolet and placed it inside petitioner's van (*id.* at 35-36). After a short conversation, the men returned to their cars and started to drive off (*id.* at 36-37). The officers attempted to stop them in order to interview them. Tomaszek sideswiped one officer's vehicle and took off at high speed in one direction, while petitioner took off at high speed in another direction. After making a number of erratic turns and going through a chainlink fence surrounding a high school through a chainlink fence surrounding a high school football field, petitioner was apprehended. A search of his vehicle disclosed that the brown paper bag contained two loaded pistols, plastic face masks, a pry bar and a sledge hammer; a third loaded pistol was found on the floor of the van (*id.* at 26).

The Parole Commission's Board of Appeals found that the testimony of the police officers concerning the circumstances of petitioner's arrest sustained the charge of unauthorized association with known criminals. It added that the charge was also sustained by petitioner's testimony in state court that he attempted to elude arrest because he did not want to be caught associating with other criminals and

knew that at least Tomaszek was a federal parolee. In respect to the charge of unauthorized possession of firearms, the Board of Appeals inferred from the testimony concerning the "desperate and immediate reaction" of petitioner and his companions when approached by the police that "a conspiracy was in progress to engage in an unlawful activity of an unknown nature involving the use of firearms and certain tools." It therefore found it to be "more likely than not" that, regardless of whether petitioner saw the two firearms being transferred to his van, he knew of their planned transfer and also knew of the third loaded firearm that was already in the van (C.A. App. Gov't Exh. Q 2).

2. The Parole Commission made the findings upon which it revoked petitioner's parole upon the basis of a preponderance of the evidence standard, as required by 18 U.S.C. 4214(d). Petitioner, invoking *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966), and *Jackson* v. *Virginia*, 443 U.S. 307 (1979), contends that it was necessary for the district court, in reviewing the Commission's decision on his petition for a writ of habeas corpus, to determine independently whether the decision was supported by a preponderance of the evidence. The cited cases do not sustain his contention. *Woodby* held that the Immigration and Naturalization Service cannot order deportation unless it finds the necessary grounds by "clear, unequivocal and convincing evidence" (385 U.S. at 286). It emphasized, however, that the standard to be imposed on judicial review is whether the order is supported by "reasonable, substantial and probative evidence" (*id.* at 282-284). Similarly, *Jackson* held that an appellate court, in reviewing a criminal conviction, need not determine whether "*it* believes that the evidence at the trial established guilt beyond a reasonable doubt," but rather whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond

a reasonable doubt." 443 U.S. at 319 (emphasis in original). Both *Wooby* and *Jackson*, in short, enunciate essentially the same "rational basis" test for judicial review that the district court applied in this case in sustaining the revocation of parole (Pet. App. 15a).

In any event, petitioner complains only of a lack of evidence to sustain the unauthorized possession of firearms charge. His parole was revoked as well on the basis of the charge of unauthorized association with known criminals, a charge which was proved by his own admissions both at the hearing (C.A. App. Gov't Exh. R 14) and in state court (*id.* at Gov't Exh. S 3-5). That charge alone is thus sufficient to support the revocation of parole, and it is clear that the district court could not have overturned the revocation even under a preponderance of the evidence standard of review. Cf. *Morrissey* v. *Brewer*, 408 U.S. 471, 490 (1972).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1982

DOJ-1982-12